

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

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5 CG TECHNOLOGY DEVELOPMENT, LLC, *et al.*,

6 Plaintiffs,

7 vs.

8 888 HOLDINGS PLC,

9 Defendant.

2:16-cv-00856-RCJ-VCF

Consolidated with:

2:16-cv-00871-RCJ-VCF

ORDER

[Defendants' Motions to Strike, ECF Nos. 73, 75]
[Defendants' Motion for Extension of Time, ECF
No. 92]

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13 Before the Court is Defendants 888 Holdings; Bwin.Party Digital Entertainment, Bwin.Party
14 (USA), and Bwin.Party Entertainment (NJ)'s motions to strike Plaintiffs CG Technology Development,
15 Interactive Games Limited, and Interactive Games LLC's amended infringement contentions (ECF Nos.
16 73, 75), Plaintiffs' response (ECF No. 76), and Defendants' reply (ECF No. 77). Before the Court is also
17 Defendants' second motion for extension of time (ECF No. 92), Plaintiffs' response (ECF No. 98), and
18 Defendants' reply (ECF No. 100). For the reasons stated below, Defendants' motions to strike and motion
19 for extension of time are granted.

20 **I. BACKGROUND**

21 This case arises from Plaintiffs' allegations that Defendants have infringed on Plaintiffs' patents
22 used in gaming. Plaintiffs filed their initial disclosure of asserted claims and infringement contentions on
23 January 5, 2017. (ECF No. 73 at 2). Defendants subsequently filed their initial disclosure of non-
24 infringement, invalidity, and unenforceability contentions. (ECF No. 76 at 1). In response to Defendants'
25 contentions, Plaintiffs filed an amended set of contentions. (*Id.*). In a letter to Defendants, Plaintiffs

1 stated, “Based on Defendants’ noninfringement contentions, it became clear that Defendants’
2 misinterpreted Plaintiffs’ theories.... Plaintiffs responded by clarifying and amplifying their positions, as
3 to avoid further confusion, particularly as these cases enter the scheduled claim construction proceedings.”
4 (ECF No. 73, Ex. 1 at 2).

5 The briefings in this case highlight several changes made in Plaintiffs’ amended contentions.
6 Plaintiffs added claims 26, 30, and 33 regarding the 818 patent. (ECF No. 73 at 1). These claims are
7 similar to Plaintiffs’ original claims, merely changing certain terms such as “portable communication
8 device” to “controller” and “allowing play” to “either allowing participation in the game...or adjusting
9 the game.” (*Id.* at 5). Plaintiffs also added claims 1 and 6-9 regarding the 058 patent. (ECF No. 75 at 2).
10 These claims are similar to original claims, changing “computer system” to “method” and adding details
11 about the display screen. (*Id.* at 3). In addition, Plaintiffs changed terms used in its original claims
12 regarding the 818 and 952 patents, such as changing “control switch” to “multiple capacitor sensors” and
13 changing the definition of “selectable betting parameter.” (*Id.* at 6).¹

14 Defendants filed two motions to strike the amended contentions on June 30, 2017. (ECF No. 73,
15 75). Defendants argue Plaintiffs lack good cause to amend their contentions because the claims should
16 have been asserted in Plaintiffs’ original contentions. (ECF No. 73 at 5, ECF No. 75 at 4). Defendants
17 assert Plaintiffs are impermissibly setting a moving target for Defendants to chase. (ECF No. 75 at 6-7).
18 In response, Plaintiffs argue amending their contentions was a procedurally proper way to respond to
19 Defendants’ misapprehension of Plaintiffs’ claims. (ECF No. 76 at 4-5).

20 While the motions to strike were pending, the parties exchanged their proposed terms for
21 construction on August 10, 2017. (ECF No. 91 at 2-3). Defendants proposed terms included several terms
22 added to, removed from, or altered in Plaintiffs’ amended contentions, such as “portable communication
23 device,” “control switches,” “allowing play,” and “selectable betting parameter.” (*Id.*, Ex. 2 at 1-4).

25 ¹ The amendments also added screen shots and citations to Defendants’ contentions to support Plaintiff’s claims. (ECF 73,
Ex. A at 2). Defendants do not appear to object to these amendments.

1 Plaintiffs, however, asserted that “Plaintiffs do not believe that any terms of [the patents] requires
2 construction by the Court at this time.” (*Id.*, Ex. 1 at 1).

3 The parties were originally scheduled to exchange their preliminary claim constructions on
4 September 8, 2017. (ECF No. 91 at 2). Defendants filed a motion to extend this deadline on August 28,
5 2107. (*Id.* at 1). Plaintiffs argue additional time is needed to define the terms and prepare evidence in
6 support of the proposed definitions. (*Id.* at 3-4). In response, Plaintiffs argue the current discovery
7 schedule is adequate to meet the parties’ discovery needs. (ECF No. 98 at 2-3).

8 II. DISCUSSION

9 In support of their request for an extension of time to define terms in this case, Defendants argue
10 that the new or altered claims at issue in their motions to strike present a moving target until the motions
11 to strike are resolved. (ECF No. 91 at 2, 7). As these motions are related, the Court will begin by resolving
12 Defendants’ motions to strike Plaintiffs’ amended contentions.

13 A. Motion to Strike

14 Defendants argue there was no good cause for Plaintiffs to amend their contentions because (1)
15 the amended claims are similar to the original claims, (2) the amended claims are based on the same
16 evidence as the original claims, and (3) Defendants will be prejudiced by the amendments. (ECF No. 73
17 at 4-7; ECF No. 75 at 2-8). Plaintiffs argue there was good cause for the amendment because (1) the rules
18 of procedure allow amendments as a form of responding to Defendants’ contentions, (2) the amendments
19 were necessary to correct Defendants’ misapprehension of Plaintiffs’ claims and add in information
20 provided in Defendants’ contentions, and (3) Defendants will not be prejudiced by the amendments. (ECF
21 No. 76 at 2-10). Plaintiffs assert they did not change their theory in the case but merely clarified their
22 position. (*Id.* at 10-12). For example, “Plaintiffs were forced to clarify through their supplemental
23 contentions that a touch screen is a ‘control switch’ based on its functionality.” (*Id.* at 11).

24 The Court does not agree that amending initial contentions should be allowed as a response to
25 initial noninfringement, invalidity, and unenforceability contentions under LPR 1-10. The process of

1 serving a response and amending initial contentions are controlled by separate rules. Plaintiffs' arguments
2 regarding its duty to respond to Defendants' contentions are irrelevant to the issue before the Court.

3 Though parties can amend their initial contentions without the Court's leave prior to the close of
4 discovery, the parties still must demonstrate good cause. LPR 1-12. "Because the Local Patent Rules do
5 not require a party to obtain leave of court to file amended Non-Infringement, Invalidity, and
6 Unenforceability Contentions prior to the close of discovery, the proper procedure to challenge
7 such amended contentions is through a motion to strike." *Bravo Co. USA, Inc. v. Badger Ordnance LLC*,
8 No. 2:14-cv-00387-RCJ-GWF, 2016 WL 6518436, at *2 (D. Nev. Nov. 2, 2016). "In contrast to the
9 liberal policy for amending pleadings under Rule 15, 'the philosophy behind amending claim charts [under
10 the Local Patent Rules] is decidedly conservative and designed to prevent the "shifting sands" approach
11 to claim construction.'" *Silver State Intellectual Techs., Inc. v. Garmin Int'l, Inc.*, 32 F. Supp. 3d 1155,
12 1161–62 (D. Nev. 2014) (quoting *Genentech, Inc. v. Amgen, Inc.*, 289 F.3d 761, 774 (Fed.Cir.2002)).
13 LPR 1-12 gives three non-exhaustive examples of circumstances that may demonstrate good cause: "(a)
14 a claim construction by the court different from that proposed by the party seeking amendment; (b) recent
15 discovery of material prior art despite earlier diligent search; and (c) recent discovery of nonpublic
16 information about the Accused Instrumentality despite earlier diligent search."

17 Plaintiffs have failed to show good cause to amend their initial contentions in this case. The
18 amendments attempted to resolve disagreements regarding terms between the parties. The clearest
19 example of this is provided in Plaintiffs' opposition to Defendants' motion to strike, where Plaintiffs assert
20 they were "forced to clarify through their supplemental contentions that a touch screen is a 'control switch'
21 based on its functionality." (ECF No. 76 at 11). However, this is not the proper method to attempt to
22 resolve a disagreement in terms. LPRs 1-13 through 1-18 provide the proper procedure: the parties
23 exchange proposed terms for constructions, attempt to agree on the definitions of these terms, and submit
24 the contested terms and definitions to the Court for resolution. Should the Court rule against a party's
25 proposed definitions, LR 1-12 gives this as one of the explicit examples that could potentially provide a

1 basis to amend the party's contentions. Plaintiffs have attempted to circumvent this procedure by
2 prematurely amending their contentions. Should Plaintiffs believe, for example, that a "control switch"
3 can be defined to extend to touch screens, this is an argument that should be presented during the exchange
4 of terms. Plaintiffs inconsistently assert that they "do not believe that any terms of [the patents] requires
5 construction by the Court at this time" (ECF No. 91, Ex. 1 at 1), including "control switches."

6 Mere disagreement in terms does not constitute good cause to amend initial contentions. In
7 addition, despite Plaintiffs' assertion that their amendments added in newly discovered information from
8 Defendants' contentions, this new information did not form the basis for the new claims or change in
9 terms. The new information simply clarified Plaintiffs' original claims. Because Plaintiffs failed to
10 demonstrate good cause to amend their contentions, the Court need not go into the issue of prejudice.
11 Therefore, defendants' motions to strike are granted.

12 **B. Motion for Extension of Time**

13 A claim construction schedule can be amended when circumstances warrant. LPR 1-17. In
14 addition, the Court may modify the deadlines established under the local rules based on the circumstances
15 of the particular case. LPR 1-3. Because this Court has ruled to strike Plaintiffs' amended contentions,
16 thus clarifying the terms at issue in the case, the parties will need additional time for the construction of
17 terms process. In addition, despite Plaintiffs' arguments that the current discovery scheduled is sufficient,
18 it is necessary to adjust the discovery schedule due to the term construction extension and other
19 complexities in this case, such as potentially coordinating discovery with multiple cases across different
20 jurisdictions.

21 Accordingly,

22 IT IS HEREBY ORDERED that the Defendants' motions to strike Plaintiffs' Amended
23 Infringement Contentions (ECF Nos. 73, 75) are GRANTED. The case shall proceed under Plaintiffs'
24 original contentions.

1 IT IS FURTHER ORDERED that Defendants' Motion for Extension of Time (ECF No. 92) is
2 GRANTED. The Court will issue the adjusted deadlines at the September 7, 2017 hearing.

3 IT IS SO ORDERED.

4 DATED this 6th day of September, 2017.

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6 CAM FERENBACH
7 UNITED STATES MAGISTRATE JUDGE
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